

1 UNITED STATES OF AMERICA  
2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF CALIFORNIA

4 - - -  
5 HONORABLE THOMAS J. WHELAN  
6 UNITED STATES DISTRICT JUDGE PRESIDING  
7 - - -

8 UNITED STATES OF AMERICA, )  
9 )  
10 PLAINTIFF, )  
11 )  
12 VS. ) NO. 10CR1372W  
13 )  
14 JONATHAN LEAL-DEL CARMEN, )  
15 DOMINGO GOMEZ-AGUILAR, )  
16 )  
17 DEFENDANTS. )  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )

**MOTION HEARING**

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
**AUGUST 30, 2010**  
SAN DIEGO, CALIFORNIA

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1 APPEARANCES OF COUNSEL:

2 ON BEHALF OF PLAINTIFF:

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4 UNITED STATES ATTORNEY  
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7 ON BEHALF OF DEFENDANT LEAL-DEL CARMEN:

8 FEDERAL DEFENDERS OF SAN DIEGO  
9 BY: MR. HANNI FAKHOURY, ESQ.  
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ST. 900  
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11 ON BEHALF OF DEFENDANT GOMEZ:

12 MR. ROBERT CARRIEDO, ESQ.  
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1 MADAM CLERK: CASE NO. 10CR1372, UNITED STATES OF  
2 AMERICA VERSUS JONATHAN LEAL-DEL CARMEN AND DOMINIGO GOMEZ-  
3 AGUILAR.

4 MR. FAKHOURY: GOOD AFTERNOON, AGAIN, YOUR HONOR,  
5 HANNI FAKHOURY, FEDERAL DEFENDERS, ON BEHALF OF MR. LEAL-DEL  
6 CARMEN.

7 THE COURT: GOOD AFTERNOON.

8 MR. CARRIEDO: GOOD AFTERNOON, YOUR HONOR, ROBERT  
9 CARRIEDO ON BEHALF OF DOMINGO GOMEZ-AGUILAR. HE SHOULD BE  
10 HERE SHORTLY.

11 THE COURT: GOOD AFTERNOON.

12 MR. MILLER: STEVE MILLER FOR THE UNITED STATES.

13 THE COURT: GOOD AFTERNOON.

14 MR. MILLER: GOOD AFTERNOON, YOUR HONOR.

15 MR. FAKHOURY: YOUR HONOR, MR. LEAL-DEL CARMEN IS  
16 PRESENT IN COURT. HE IS THE INDIVIDUAL WITH THE MUSTACHE, TO  
17 YOUR HONOR'S RIGHT.

18 THE COURT: THANK YOU.

19 MR. CARRIEDO: YOUR HONOR, MR. GOMEZ IS ALSO  
20 PRESENT. HE IS USING THE SERVICES OF THE SPANISH LANGUAGE  
21 INTERPRETER AS WELL.

22 THE COURT: BOTH DEFENDANTS ARE BEING SO ASSISTED.  
23 ALL RIGHT, THIS MATTER IS ON CALENDAR FOR A MOTION HEARING.  
24 IN THAT REGARD THE RECORD CAN REFLECT THAT I HAVE READ AND  
25 CONSIDERED THE DEFENSE'S MOVING PAPERS, INCLUDING THE

1 DECLARATION OF MR. LEAL-DEL CARMEN. I HAVE READ AND  
2 CONSIDERED THE GOVERNMENT'S RESPONSE, BOTH RESPONSES, I  
3 SHOULD SAY.

4 STARTING WITH DOCKET NO. 21-1, THAT'S THE MOTION  
5 FOR DISCOVERY. THERE DON'T APPEAR TO BE ANY ISSUES YOU NEED  
6 ME TO RESOLVE.

7 MR. FAKHOURY: THERE IS ONE ISSUE, YOUR HONOR.

8 THE COURT: ALL RIGHT.

9 MR. FAKHOURY: I MISSPOKE, THERE ARE TWO ISSUES.  
10 THE FIRST ISSUE THERE WAS A MATERIAL WITNESS DEPOSITION IN  
11 THIS CASE, YOUR HONOR. THE MATERIAL WITNESSES WERE DEPOSED,  
12 AND IT'S MY UNDERSTANDING THAT MR. MILLER HAS RECEIVED A COPY  
13 OF THE TRANSCRIPT OF THE DEPOSITION. HE HADN'T TURNED IT  
14 OVER. WE HAVE HAD A LITTLE BIT OF A DISPUTE WHETHER HE IS  
15 OBLIGATED TO TURN IT OVER. I AM MAKING A REQUEST THAT HE  
16 TURN OVER, THROUGH DISCOVERY MEANS, THE TRANSCRIPT OF THE  
17 MATERIAL WITNESS DEPOSITION, SPECIFICALLY UNDER RULE  
18 16(A) (1) (E) (2), WHICH SAYS THAT UPON A DEFENDANT'S REQUEST,  
19 GOVERNMENT MUST PERMIT THE DEFENDANT TO INSPECT AND TO COPY  
20 OR PHOTOGRAPH DOCUMENTS, ETC., AND THE GOVERNMENT INTENDS TO  
21 USE THE ITEM IN ITS CASE-IN-CHIEF AT TRIAL.

22 GIVEN THAT THE DEPOSITION WOULD BE THE TESTIMONY OF  
23 TWO WITNESSES WHO ARE NO LONGER PRESENT BECAUSE THEY HAVE  
24 BEEN RELEASED AND RETURNED, I AM MAKING A SPECIFIC REQUEST  
25 UNDER RULE 16 FOR THE DEPOSITION TRANSCRIPT TO BE TURNED OVER

1 BY MR. MILLER. THAT'S THE FIRST ISSUE, AND I DON'T KNOW IF  
2 THE COURT --

3 THE COURT: LET ME HEAR FROM MR. MILLER ON THAT ONE  
4 FIRST.

5 MR. MILLER: I WILL DO WHAT THIS COURT TELLS ME,  
6 HOWEVER, CUSTOM IN THE PAST HAS BEEN WHEN THERE IS A  
7 DEPOSITION AND THERE IS A COST OF TRANSCRIPTS, BOTH PARTIES  
8 BEAR THE COST OF THOSE TRANSCRIPTS. AND THE CASE OF THE  
9 DEPOSITION, THE GOVERNMENT BEARS THE COST OF THE ORIGINALS,  
10 AND THE DEFENSE BEARS THE COST OF THE COPIES.

11 THIS IS REALLY A MATTER OF COMMERCIAL PROTOCOL. I  
12 HESITATED TO TURN OVER COPIES OF THE DEPOSITION OUT OF  
13 RESPECT FOR THE COURT REPORTER, WHO USES THIS AS A COMMERCIAL  
14 VENTURE.

15 I HAVE HAD A CASE IN THE PAST WHERE THE SAME  
16 REQUEST WAS MADE IN ORDER FOR THE FEDERAL DEFENDERS TO OBTAIN  
17 A FREE COPY OF THE MATERIAL WITNESS DEPOSITIONS, AND I WAS  
18 INFORMED THAT THIS ISSUE IS SORT OF ONE THAT'S COMING TO A  
19 HEAD IN HAVING SOME KIND OF BUTTING OF HEADS BECAUSE OF  
20 BUDGETARY CONSTRAINTS FOR THE FEDERAL DEFENDERS WHERE THE  
21 DIRECTOR OF THE FEDERAL DEFENDERS HAS MADE A DECISION TO  
22 PRESS THIS ISSUE EVERY TIME THE FEDERAL DEFENDERS HAS TO  
23 OBTAIN A COPY OF THE DEPOSITION ORDERS.

24 JUST AS A MATTER OF WHAT I UNDERSTAND THE PROCEDURE  
25 TO BE FOR COURT REPORTERS WHO ARE PAID TO PREPARE THE

1 TRANSCRIPTS --

2 THE COURT: WELL, IT'S MY OPINION IT'S NOT  
3 APPROPRIATE FOR YOUR OFFICE TO COPY THE DEPOSITION AND TURN  
4 IT OVER BECAUSE, AS YOU INDICATED, THAT DOES AFFECT THE  
5 LIVELIHOOD OF THE COURT REPORTERS. AS LONG AS THE MATERIAL  
6 IS READILY AVAILABLE TO MR. FAKHOURY AND HE CAN REQUEST A  
7 COPY, SINCE YOU ALREADY PAID FOR THE ORIGINAL, YOU PAID THE  
8 HIGHEST PRICE, HIS OFFICE CAN PAY THE COPY PRICE AND RETAIN  
9 THEIR OWN COPY. MR. FAKHOURY, FROM THAT STANDPOINT, YOUR  
10 REQUEST IS DENIED.

11 WHAT'S THE OTHER ISSUE?

12 MR. FAKHOURY: THE OTHER ISSUE, YOUR HONOR, IS  
13 RELATED TO THE MOTION REGARDING DEPORTATION OF MS. GARCIA-  
14 GARCIA, ANOTHER MATERIAL WITNESS. I HAD FILED, IN ADDITION  
15 TO THE PAPERS REGARDING THIS SPECIFIC MOTION TO DISMISS, I  
16 REQUESTED SPECIFICALLY SOME OTHER ITEMS OF DISCOVERY THAT  
17 INCLUDES AN OPPORTUNITY TO INSPECT THE A-FILE OF ALL MATERIAL  
18 WITNESSES, INCLUDING THOSE RETAINED AS MATERIAL WITNESSES.

19 TO GIVE THE COURT SOME BACKGROUND, THERE WERE THREE  
20 MATERIAL WITNESSES RETAINED, AND THERE WERE, I BELIEVE, NINE  
21 THAT WERE ULTIMATELY RELEASED TO MEXICO AND NOT DETAINED AS  
22 MATERIAL WITNESSES. I'M ASKING FOR ONE, AN OPPORTUNITY TO  
23 INSPECT AND EXAMINE ALL OF THE A-FILES OF RETAINED AND  
24 UNRETAINED MATERIAL WITNESSES.

25 SECONDLY, I RECEIVED VIDEO FROM MS. GARCIA-GARCIA'S

1 STATEMENT, EVEN THOUGH SHE WAS NOT RETAINED AS A MATERIAL  
2 WITNESS, AND RECEIVED THE VIDEO STATEMENTS OF THREE MATERIAL  
3 WITNESSES THAT WERE RETAINED, BUT I HAVE RECEIVED VIDEO OF  
4 THE OTHER, I GUESS IT WOULD MAKE IT, EIGHT MATERIAL  
5 WITNESSES.

6 FORGIVE ME, MR. MILLER, IF I MISSPOKE, I THOUGHT  
7 MR. MILLER SAID THEY MAY NOT EXIST AT ALL, BUT I'M JUST  
8 PUTTING ON THE RECORD A REQUEST IF THEY DON'T EXIST,  
9 MR. MILLER, SAY-SO, AND END THAT. I WANT TO MAKE SURE I MADE  
10 THE REQUEST ON THE RECORD.

11 MR. MILLER: I INQUIRED ABOUT THAT SPECIFIC POINT,  
12 ASKED IF THERE WERE ANY OTHER RECORDINGS, AUDIO OR VIDEO, OF  
13 ANY OF THE OTHER MATERIAL WITNESSES, AND I WAS TOLD NO. WHAT  
14 HAD HAPPENED, AND THIS IS CUSTOMARY PROCEDURE, THAT IS, WHEN  
15 THEY GET A GROUP OF UNDOCUMENTED ALIENS, THEY WILL INTERVIEW  
16 ONE, VIDEO RECORD THAT PERSON, AND WHAT HAPPENED WAS BECAUSE  
17 OF THE GENERAL NATURE OF MS. GARCIA-GARCIA'S ANSWERS, THEY  
18 PLAYED IT SAFE AND GOT A MORE COMPETENT PERCEPTIVE WITNESS  
19 BECAUSE SHE HAD ALREADY BEEN VIDEOTAPED. IT WAS KEPT ON THAT  
20 DISK AND TURNED OVER. I HURRIED UP AND GOT COPIES OF ALL THE  
21 VIDEOS SO COUNSEL WOULD HAVE THEM BEFORE THE DEPOSITIONS,  
22 HAVE THEM AVAILABLE.

23 THE COURT: SO, YOU TURNED OVER ALL THE EXISTING  
24 VIDEOS?

25 MR. MILLER: YES.

1 THE COURT: THAT ANSWERS THAT QUESTION.

2 MR. MILLER: AS TO THAT.

3 NO OTHER RECORDINGS OF ANY OTHER STATEMENTS OF THE  
4 REMAINING EIGHT EXIST.

5 MR. FAKHOURY: YOUR HONOR, I APPRECIATE  
6 MR. MILLER'S COMMENTS. THE ONLY OTHER THING I WANTED TO PUT  
7 ON THE RECORD, I CAN'T TELL WHETHER THE ISSUE OF WHETHER THE  
8 STATEMENT WAS RECORDED OR UNRECORDED ASIDE, I CAN'T TELL  
9 WHETHER THERE WAS ACTUALLY A STATEMENT TAKEN, EVEN IF IT WAS  
10 UNRECORDED, FOR THE OTHER EIGHT MATERIAL WITNESSES. IT'S  
11 BEEN MY PRACTICE AND MY EXPERIENCE IN THESE TYPES OF CASES  
12 THAT THEY USUALLY AT LEAST TAKE A STATEMENT FROM EVERY  
13 MATERIAL WITNESS, WHETHER THEY KEEP THEM IN THE OFFICIAL, SO  
14 TO SPEAK, MATERIAL WITNESS AND PULL THEM INTO THE COUNTRY OR  
15 NOT TO HAVE A STATEMENT TAKEN. I THOUGHT THEY USUALLY  
16 VIDEOTAPE IT. APPARENTLY THEY DIDN'T FOR AT LEAST EIGHT OF  
17 THESE INDIVIDUALS. BUT I HAVE NO STATEMENTS FROM THESE EIGHT  
18 INDIVIDUALS AT ALL. I WOULDN'T PRESS THE ISSUE SO MUCH, BUT  
19 FOR THE MOTION TO DISMISS I FILED REGARDING THE DEPORTATION  
20 OF MS. GARCIA-GARCIA THAT RAISED SOME RED FLAGS, IN MY  
21 OPINION.

22 THE COURT: MR. MILLER, ANY STATEMENT YOU ARE AWARE  
23 OF, OTHER THAN THE NON-RETAINED MATERIAL WITNESSES?

24 MR. MILLER: NONE THAT I AM AWARE OF. I CAN SPEAK  
25 TO CUSTOMS, THAT IS USUALLY WHEN A GROUP OF MATERIAL



1 WITNESSES IS APPREHENDED AND THAT IF IT'S SMUGGLED, THE  
2 STATEMENTS THAT THEY TAKE ARE FOR PURPOSES OF REMOVING THOSE  
3 PARTICULAR ALIENS. AND THEN THE STATEMENTS ARE, WHAT IS YOUR  
4 CITIZENSHIP? WHERE WERE YOU BORN? WHERE WERE YOUR PARENTS  
5 BORN? DO YOU HAVE ANY DOCUMENTATION?

6 THE COURT: ALL RIGHT. LET'S DO IT THIS WAY, I  
7 KNOW YOU TURNED OVER EVERYTHING YOU ARE AWARE OF. WOULD YOU  
8 JUST CHECK YOUR CASE AGENTS TO SEE IF THERE ARE ANY WRITTEN  
9 STATEMENTS TAKEN AND TURN THEM OVER? IF NOT, THAT'S FINE.  
10 YOU CAN'T TURN THEM OVER IF THEY DON'T EXIST. OTHERWISE YOU  
11 WILL TURN THEM OVER, FAIR ENOUGH, MR. FAKHOURY?

12 MR. FAKHOURY: THAT'S FINE.

13 THE COURT: MR. CASILLAS (SIC) YOU WILL GET THEM  
14 ALSO.

15 MR. CARRIEDO: I'M SORRY?

16 THE COURT: MR. CASILLAS WAS ON THE LAST MATTER.

17 MR. CASILLAS: IT'S A LONG DAY.

18 THE COURT: WITH REGARD TO DOCUMENT NO. 22, THAT'S  
19 A MOTION TO PRESERVE EVIDENCE. AT THIS POINT, MR. FAKHOURY,  
20 THAT'S OVERBROAD, SO I TEND TO DENY IT. BUT YOUR REQUEST IS  
21 ALL EVIDENCE THAT MAY BE DESTROYED, CAN BE DESTROYED. I  
22 CAN'T ISSUE AN ORDER PRESERVING ALL EVIDENCE THAT MAY BE  
23 DESTROYED.

24 MR. FAKHOURY: PROBABLY TO MAKE IT A LITTLE MORE  
25 SPECIFIC, IT WAS MORE TOWARDS THE VIDEOTAPE, IF THEY DID

1 EXIST, ANY WRITTEN REPORTS THAT DO EXIST. IT'S MY  
2 UNDERSTANDING THERE REALLY IS NOT ANY PHYSICAL SUBSTANTIVE  
3 EVIDENCE, THERE IS NO GUNS, OR DRUGS OR ANYTHING OF THAT  
4 SORT. FROM WHAT MR. MILLER SAID THERE ARE NO VIDEOTAPES THAT  
5 EXIST AND THERE IS NOTHING TO PRESERVE. THE COURT CAN RULE  
6 ON THAT OR LEAVE IT OPEN. IF I HAVE A MORE SPECIFIC REQUEST,  
7 IF THINGS COME TO MIND, I WILL LET THE COURT KNOW.

8 THE COURT: I WILL DENY THAT AT THIS POINT AS MOOT.  
9 HE HAS TURNED OVER EVERYTHING HE IS AWARE OF VIDEOTAPE WISE  
10 AND STATEMENTS WISE. IF SOMETHING COMES UP, PREPARE  
11 SOMETHING, REPRESENT IT TO ME, HE WILL TURN IT OVER TO YOU.

12 MR. FAKHOURY: THAT'S FINE. I CAN ACCEPT THAT.  
13 THANK YOU.

14 THE COURT: DOCKET NO. 21-3, DEFENSE'S MOTION TO  
15 FILE FURTHER MOTIONS, MY TENTATIVE WOULD BE TO GRANT THAT  
16 PROVIDED ANY NEW MOTIONS ARE BASED ON NEWLY DISCOVERED  
17 EVIDENCE. ANY OBJECTION TO THAT, MR. MILLER?

18 MR. MILLER: NO.

19 THE COURT: THAT'S GRANTED.

20 WITH REGARD TO DOCKET NO. 41-2, THAT'S ANOTHER  
21 MOTION TO COMPEL DISCOVERY. I WILL LEAVE THAT PENDING,  
22 MR. FAKHOURY, IS THAT AGREEABLE?

23 MR. FAKHOURY: THAT'S FINE, YOUR HONOR. THAT GOES  
24 BACK TO MY MOTION TO DISMISS. I THINK THE COURT'S ALREADY  
25 ADDRESSED THAT.

1 THE COURT: WITH REGARD TO DOCKET 41-1, MOTION TO  
2 DISMISS ON THE BASIS THE GOVERNMENT ALLEGEDLY DEPORTED  
3 EXCULPATORY WITNESSES.

4 THE FIRST PRONG THERE I HAVE TO LOOK TO SEE WHETHER  
5 OR NOT, IN THE COURT'S MIND, THE GOVERNMENT ACTED IN BAD  
6 FAITH. QUITE FRANKLY, MR. FAKHOURY, I DON'T SEE ANY  
7 INDICATION THEY ACTED IN BAD FAITH. TO ME WHAT IT SHOWED WAS  
8 GOOD FAITH THE FACT THEY VIDEOTAPED MS. GARCIA'S INTERVIEW.  
9 YOUR CLIENT DID SIGN A WAIVER.

10 THE MATERIAL WITNESS THAT WE ARE TALKING ABOUT,  
11 MS. GARCIA, HER STATEMENT WITH REGARD TO NOT HEARING YOUR  
12 CLIENT GIVE ANY DIRECTION, IS CUMULATIVE OF WHAT HER  
13 BOYFRIEND, MR. GONZALEZ, SAYS, WHICH WAS HE WAS RETAINED AND  
14 HIS DEPOSITION WAS TAKEN.

15 AND ALSO, EXHIBIT A, I BELIEVE IT IS, TO YOUR  
16 PAPERS, IS THE TRANSCRIPT OF THE INTERVIEW OF MS. GARCIA, AND  
17 IN ABOUT A PAGE-AND-A-HALF, SPECIFICALLY FROM PAGE 9, LINE  
18 ONE, THROUGH PAGE 10, LINE 15, END RESPONSE TO QUESTIONS SHE  
19 SAYS, "I DON'T REMEMBER. I WASN'T LOOKING." AND THEN SHE  
20 SAYS, "I DON'T KNOW, AT LEAST FIVE OCCASIONS." SO, THAT TO  
21 ME IS CERTAINLY NOT SOMEONE WHO'S GOING TO HAVE SOMETHING  
22 THAT'S GOING TO BE MATERIALLY HELPFUL TO THE DEFENSE. IN  
23 FACT, IT APPEARS SHE WAS BEING SOMEWHAT EVASIVE.

24 IN ANY EVENT, HER BASIC STATEMENTS YOU'RE RELYING  
25 ON SHE DIDN'T HEAR THE CLIENT GIVE ORDERS, WHICH IS PERFECTLY

1 CONSISTENT WITH WHAT MR. GONZALEZ SAID, AND LIKEWISE, DIDN'T  
2 HEAR YOUR CLIENT DIRECT THE GROUP OR GIVE ORDERS. ALTHOUGH  
3 YOU ARE AWARE IN THE DEPOSITION HE INDICATES HE DID SEE YOUR  
4 CLIENT LAY A BLANKET ON THE DIRT ROAD AND ALL THE GROUP  
5 WALKED ACROSS THE BLANKET, BUT THAT'S HERE NOR THERE. FOR  
6 PURPOSES OF WHETHER OR NOT SHE HAD EXCLUSIVELY SPOKE TOWARDS  
7 MR. (INAUDIBLE), I JUST DON'T SEE THAT IT'S THERE. IT'S HARD  
8 TO BELIEVE HER TESTIMONY OF, "I DON'T RECALL, AND I WASN'T  
9 LOOKING, AND I DON'T REMEMBER," WOULD BE RELEVANT, AND  
10 MATERIAL OR ANYTHING, ESPECIALLY SINCE ANYTHING SHE HAD TO  
11 SAY OR DID SAY BASICALLY IS CUMULATIVE OF WHAT MR. GONZALEZ  
12 SAID. I DON'T THINK THAT'S ALL EXCULPATORY. CERTAINLY, IF  
13 ANYTHING, IT'S AN INADEQUATE SHOWING OF THE STATEMENT OF YOUR  
14 CLIENT NOT GIVING ANY ORDERS IS EXCULPATORY.

15 MR. FAKHOURY: YOUR HONOR, IF I COULD JUST BRIEFLY  
16 ADD A COUPLE OF THINGS?

17 THE COURT: SURE.

18 MR. FAKHOURY: ONE, WITH RESPECT TO THE LUJAN-  
19 CASTRO WAIVER, THAT MR. LEAL PURPORTEDLY SIGNED, I DISPUTE  
20 THAT AND I DISAGREE WITH MR. MILLER ABOUT IT. I DON'T HAVE A  
21 COPY OF THE WAIVER IN DISCOVERY. I RECEIVED ONE FOR THE  
22 CO-DEFENDANT, MR. AGUILAR. BUT I NEVER RECEIVED ONE FOR  
23 MR. LEAL'S BEHALF.

24 I NOTED THAT THE REPORT OF INVESTIGATION INDICATED  
25 THAT MR. LEAL DID GIVE -- DID NOT REQUEST TO RETAIN ANY

1 MATERIAL WITNESS. AS I ATTACHED TO A DECLARATION, THERE WAS  
2 NEVER ANY EXPLANATION AS TO WHAT THE MATERIAL WITNESSES HAD  
3 SAID TO HIM.

4 SO, WITH RESPECT TO THE VALIDITY OF THE  
5 LUJAN-CASTRO WAIVER, I DON'T THINK ANY SUCH WAIVER WOULD BE  
6 VALID IN THIS CASE, EVEN IF ONE EXISTED IN WRITTEN FORM,  
7 WHICH I HAVEN'T SEEN, AND EVEN AN ORAL ONE, I THINK, IS NOT  
8 VALID BECAUSE, AS INDICATED, MR. LEAL'S DECLARATION THERE IS  
9 NO CHANCE FOR HIM TO KNOWINGLY CHOOSE TO EXCISE THAT RIGHT.

10 WITH RESPECT TO WHETHER MS. GARCIA'S STATEMENTS  
11 WERE CONSISTENT WITH HER BOYFRIEND, AND I THINK IT WAS  
12 MR. GONZALEZ, IF I AM INCORRECT I APOLOGIZE, AGAIN, ALSO YOUR  
13 HONOR, I RESPECTFULLY DISAGREE THAT THEY ARE CONSISTENT. I  
14 THINK THEY ARE INCONSISTENT IN THE SENSE THAT THE OTHER --  
15 I'M SORRY, THE OTHER THREE MATERIAL WITNESSES ALL BASICALLY  
16 POINT THE FINGER AT MR. LEAL SAYING THAT HE WAS DIRECTING AND  
17 SAYING ORDERS, AND MS. GARCIA IN STARCK CONTRAST SAYS, "NO, I  
18 NEVER HEARD THAT."

19 NOW, I CERTAINLY CAN SEE THE COURT'S CONCERN WITH  
20 RESPECT TO MS. GARCIA'S, KIND OF, "I DON'T KNOW, I'M NOT  
21 SURE," BUT WITH RESPECT TO THAT SPECIFIC PORTION OF HER  
22 INTERVIEW, SHE WAS VERY FIRM AND STEADY. IN FACT, THE AGENTS  
23 EVEN ASKED HER, I THINK, SOMETHING TO THE EFFECT OF, "PARDON  
24 ME?" AND SHE SAID THE SAME THING, "HE DID NOT DIRECT US."  
25 THEY SAID, "NO?" AND SHE SAID, "NO."

1           SO, WHATEVER FUZZINESS OR UNCERTAINTY SHE MAY HAVE  
2       HAD, IN GENERAL, I THINK, AT LEAST WITH RESPECT TO THIS  
3       SPECIFIC PORTION, AND THE MOST RELEVANT AND MOST  
4       SIGNIFICANTLY BRADY PORTION OF THAT STATEMENT, SHE WAS VERY  
5       FIRM AND I THINK SHE WAS CONSISTENT.

6           AND YOU KNOW, YOUR HONOR, I HATE TO SAY THE  
7       GOVERNMENT ACTS IN BAD FAITH AND JUST THROW IT OUT THERE, BUT  
8       I WOULD NOTE, AGAIN, GOING BACK TO WHAT MR. MILLER SAID  
9       EARLIER, THEY ONLY TAKE STATEMENTS OF MATERIAL WITNESSES  
10      CUSTOMARILY JUST TO EXPEDITE THE REMOVAL, AND IT'S BACKGROUND  
11      IMMIGRATION INFORMATION. I THINK IT'S TELLING THAT THERE ARE  
12      12 INDIVIDUALS APPREHENDED, EIGHT ARE SUMMARILY REMOVED  
13      WITHOUT ANY STATEMENT BEING TAKEN BY THEM AS TO WHAT HAPPENED  
14      IN THE OFFENSE, THREE ARE RETAINED AS MATERIAL WITNESSES, AND  
15      VIDEOTAPED AND THEN WE HAVE MS. GARCIA WHO'S KIND OF IN THE  
16      MIDDLE. THEY TAKE A STATEMENT FROM HER, UNLIKE THE OTHER  
17      EIGHT INDIVIDUALS WHO ARE REMOVED, VIDEOTAPE THE STATEMENT,  
18      LIKE THE THREE OTHER INDIVIDUALS WHO ARE RETAINED, AND  
19      ULTIMATELY DECIDE TO REMOVE HER.

20           I THINK IT'S THAT ODD SEQUENCE OF EVENTS THAT LEADS  
21      ME TO BELIEVE THAT THERE IS AT LEAST AN INDICATION OF SOME  
22      BAD FAITH, AT A MINIMUM, REQUIRES AN EVIDENTIARY HEARING TO  
23      FURTHER FIGURE OUT WHAT THE AGENT IN THIS CASE IS  
24      CONTEMPLATING DECIDING TO TAKE HER STATEMENT IN CONTRAST TO  
25      THE OTHER EIGHT MATERIALS WITNESSES AND THEN REMOVE HER.

1 THE COURT: WHEN YOU READ THE TRANSCRIPTS,  
2 MR. FAKHOURY, YOU CAN SEE THAT SHE AND HER BOYFRIEND,  
3 MR. GONZALEZ, WHO THEY DID KEEP, ARE KIND OF IN THE MIDDLE OF  
4 THE GROUP. AND IT IS CERTAINLY CLEAR THAT SHE SAID, "NO,"  
5 REFERRING TO YOUR CLIENT, ASKED ABOUT NO. 5 WHO ALLEGEDLY IS  
6 YOUR CLIENT, THAT NO, SHE SAID, "NO, HE DIDN'T GIVE ANY  
7 ORDERS." THE AGENT SAYS, "PARDON ME?" SHE AGAIN REPEATS,  
8 "NO, HE DID NOT GIVE ORDERS." THAT'S EXACTLY CONSISTENT WITH  
9 WHAT MS. GONZALEZ SAID, THAT, "NO, HE DIDN'T GIVE ANY  
10 ORDERS," OR, "DID YOUR CLIENT GIVE ANY ORDERS?" IT'S A  
11 LITTLE DIFFERENT THAN WHAT YOUR CLIENT HAS IN HIS DECLARATION  
12 THAT HE CONTRIBUTES TO YOU THAT YOU TOLD HIM THAT MS. GARCIA  
13 SAID THAT HE WAS GUIDING THE GROUP. WELL, GUIDING THE GROUP  
14 CAN BE LOTS OF THINGS BESIDES HEARING HIM GIVING ORDERS. I  
15 THINK YOUR CLIENT HAD A LITTLE MISAPPREHENSION AS TO EXACTLY  
16 WHAT WAS SAID.

17 IN ANY EVENT, WHAT MR. GARCIA SAID IN HIS  
18 DEPOSITION, WHAT MR. GONZALEZ SAID IN HIS DEPOSITION, AND  
19 WHAT MS. GARCIA SAID IN HER INTERVIEW ARE DEFINITELY  
20 CONSISTENT, AND CUMULATIVE, AND UNDERSTANDABLE BASED ON THEIR  
21 POSITION IN THE GROUP. THEY WERE IN THE MIDDLE OF THE GROUP.  
22 SO, UNDERSTANDING THERE WERE A LOT OF PEOPLE UP CLOSER TO THE  
23 FRONT WHERE YOUR CLIENT ALLEGEDLY WAS, MAY HAVE HEARD  
24 SOMETHING, OR MAYBE PEOPLE THOUGHT IT WOULD GET BACK TO HIM.

25 MR. FAKHOURY: I CERTAINLY UNDERSTAND THE COURT'S

1 POINT. I THINK MY RECORD HAS BEEN MADE.

2 THE COURT: OKAY. FOR THE REASONS I ALREADY  
3 STATED, THE REQUEST FOR THE MOTION TO DISMISS THE INDICTMENT  
4 BECAUSE OF GOVERNMENT DEPORTS EXCULPATORY WITNESSES IS DENIED  
5 ON THE BASIS I DON'T FIND THE GOVERNMENT ACTED IN BAD FAITH,  
6 AND I DON'T FIND THE GOVERNMENT'S WITNESS WAS AN EXCULPATORY  
7 WITNESS, WOULD BE A RETAINED WITNESS SPECIFICALLY WITH REGARD  
8 TO MR. GONZALEZ.

9 WITH REGARD TO A TRIAL DATE, DO YOU WANT TO GO OFF  
10 THE RECORD AND DISCUSS A DATE? I CAN SUGGEST DATES.

11 MR. MILLER: I'M UNAVAILABLE THE WEEK OF SEPTEMBER  
12 27TH. I HAVE A TRIAL SCHEDULED.

13 THE COURT: HOW ABOUT OCTOBER 5TH?

14 MR. CARRIEDO: YOUR HONOR, I'M COMING BACK ON  
15 OCTOBER 5.

16 THE COURT: THAT'S RIGHT, FROM THIS MORNING, I'M  
17 SORRY. I SHOULD HAVE REMEMBERED THAT.

18 MR. CARRIEDO: AND I WOULD ASK THAT WE NOT START A  
19 TRIAL THAT WEEK.

20 THE COURT: CERTAINLY. ABSOLUTELY, MR. CARRIEDO,  
21 NO PROBLEM AT ALL. WHY DON'T YOU GUYS GO OFF THE RECORD AND  
22 TALK ABOUT IT, GIVE ME AN IDEA --

23 (DISCUSSION HAD OFF THE RECORD.)

24 MR. FAKHOURY: YOUR HONOR, OCTOBER 12TH, IF THAT'S  
25 AVAILABLE TO THE COURT?



1 THE COURT: NO, THAT'S NOT GOOD. I JUST SET ONE  
2 FOR THE END OF OCTOBER. IT PROBABLY WOULD HAVE TO GO INTO  
3 NOVEMBER. HOW ABOUT THE 16TH? MY CLERK SUGGESTS THAT.

4 MR. MILLER: I HAVE A TRIAL SCHEDULED FOR THE 2ND.  
5 IN THE LAND OF RATIONAL THOUGHT, IT WOULD BE DONE THAT WEEK,  
6 BUT IT INVOLVES A BORDER PATROL SHOOTING.

7 THE COURT: THAT WOULD BE TWO WEEKS AFTER THAT,  
8 THAT SHOULDN'T BE A PROBLEM.

9 MR. MILLER: OKAY.

10 THE COURT: MR. CARRIEDO, YOU ARE AVAILABLE?

11 MR. CARRIEDO: THAT'S FINE.

12 THE COURT: MR. FAKHOURY?

13 MR. FAKHOURY: I'M AVAILABLE, YOUR HONOR. MY ONLY  
14 CONCERN IT'S PRETTY FAR SINCE MR. LEAL HAS BEEN IN CUSTODY  
15 SINCE MARCH, BUT IF THAT'S THE ONLY DATE THAT WORKS --

16 THE COURT: I CAN TRY IT SOONER IF YOU WANT TO LOOK  
17 FOR SOMETHING IN SEPTEMBER?

18 MR. FAKHOURY: MY ONLY PROBLEM WITH SEPTEMBER IS I  
19 HAVE THREE STRAIGHT WEEKS OF TRIALS. I GUESS NOVEMBER 16TH  
20 IS THE ONLY DATE THAT WORKS. THAT'S FINE.

21 THE COURT: WHAT'S WRONG WITH OCTOBER 5TH? WHO  
22 COULDN'T DO -- MR. CARRIEDO IS NOT AVAILABLE.

23 MR. CARRIEDO: I'M NOT IN THE DISTRICT.

24 MR. FAKHOURY: I DON'T KNOW IF THE WEEK OF OCTOBER  
25 18TH, OR EVEN THE WEEK OF OCTOBER 25TH --

1 MR. MILLER: I HAVE A TRIAL SCHEDULED FOR THE 26TH.  
2 THAT WAS ONE YOU SET AND THEN TRANSFERRED TO JUDGE HAYES.

3 THE COURT: I'M NOT AVAILABLE THE WEEK OF THE 18TH  
4 EITHER. OKAY. NOVEMBER 16TH LOOKS LIKE THAT'S THE BEST WE  
5 CAN DO.

6 MR. MILLER: VERY WELL.

7 THE COURT: IF ANYTHING OPENS UP ON YOUR  
8 PERSPECTIVE SCHEDULES, JUST CONTACT MY CLERK AND WE WILL TRY  
9 TO MOVE IT UP.

10 MR. FAKHOURY: THAT'S FINE, YOUR HONOR.

11 THE COURT: MR. CARRIEDO, IS THAT AGREEABLE?

12 MR. CARRIEDO: YES.

13 MR. FAKHOURY: THAT'S FOR TRIAL? IN LIM'S -- THE  
14 16TH WOULD ALSO BE IN LIM'S?

15 THE COURT: YES. MR. LEAL-DEL CARMEN, IS THAT DATE  
16 ALL RIGHT WITH YOU, SIR?

17 DEFT. LEAL: WELL, YES.

18 THE COURT: MR. GOMEZ?

19 DEFT. GOMEZ: YES.

20 THE COURT: OKAY. THANK YOU, GENTLEMEN.

21 MR. FAKHOURY: THANK YOU, YOUR HONOR.

22 THE COURT: YOU ARE WELCOME.

23 (WHICH WERE ALL THE PROCEEDINGS  
24 HELD IN THE ABOVE-ENTITLED CAUSE.)  
25

